Filed 6/11/07 In re Marriage of Latourelle CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| In re Marriage of JERIANNE and JOSEPH LATOURELLE. | B185692<br><br>(Los Angeles County Super. Ct. No. KD036919) |
| JERIANNE LATOURELLE,<br><br>Appellant,<br><br>v.<br><br>JOSEPH LATOURELLE,<br><br>Appellant. | |

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick C. Shaller, Judge. Affirmed.

Law Offices of Thomas P. Dovidio, Thomas P. Dovidio, Robert Lipscomb for Appellant Jerianne Lataourelle.

Joseph Latourelle, in pro. per., for Appellant Joseph Latourelle.

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This appeal and cross-appeal are from the judgment dissolving the marriage of husband Joseph Latourelle and wife Jerianne Latourelle. Husband raises a myriad of issues, including challenges to the invalidity of the waiver of spousal support, the award of retroactive spousal support, the level of spousal support and child support, reimbursement of medical expenses, property allocations, the court's treatment of his pension plan and tax refund, and the award of attorney fees. Wife cross-appeals, contending the trial court erred in deeming invalid only that aspect of the prenuptial agreement pertaining to spousal support, and that it should have also found unenforceable the community property waiver provision in the prenuptial agreement.

We find husband's various contentions unavailing. Nor is there any merit to wife's challenge to the validity of the community property waiver based on alleged unconscionability. Her related claim of undue influence in signing the agreement is similarly unavailing, as she repeatedly confirmed their separate property and acknowledged that she signed the prenuptial agreement to dispel criticism she was marrying only for money.

## FACTUAL AND PROCEDURAL SUMMARY

In June of 1985, approximately a week before husband (age 31) and wife (age 19) married, they signed a two-page prenuptial agreement entitled "property agreement prior to marriage." The agreement contained a waiver by husband and wife of any right to spousal support from the other person, and also a waiver of any rights either would otherwise have in property acquired during the marriage, with such property to be treated as separate property.

In March of 1998, after approximately 13 years of marriage, wife petitioned for marital dissolution. The parties stipulated to pendent lite support, joint legal custody of their three children, and shared physical custody of the children. Husband requested a trial on the issue of permanent child support, and the parties submitted income and expense declarations.

In April of 2003, the trial court ordered husband to pay child support of $1,004 per month from 2001 to March of 2003, and thereafter to pay $716 per month, based on his

income from American Capacitor Corp. (ACC), a company of which he was president and majority stockholder, and from other sources. Husband appealed the trial court's determination of imputed income used to calculate child support, and we affirmed the child support order. (See *In re Marriage of Latourelle* (Feb. 25, 2005, B170393) [nonpub. opn.].)

Meanwhile, the parties proceeded to trial on issues concerning the division of property. The issues were bifurcated and two trials ensued. The first trial, in 2002, was before Judge Ann Jones and addressed the issue of the validity of the two-page prenuptial agreement. The second trial, in 2005, was before Judge Frederick Shaller and dealt with the remaining claims by wife concerning spousal and child support and the division of property.

At the trial in 2002 before Judge Jones, the court reviewed the prenuptial agreement. Wife challenged her waiver of spousal support and of her right to any community property as invalid and unenforceable. The trial court concluded that the provision waiving spousal support was invalid. It reasoned that a provision waiving spousal support, though permissible now, was void when executed in June of 1985 as contrary to public policy (see *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 46 (*Pendleton*)), and that neither fairness nor public policy considerations required it to revive retroactively a waiver that was illegal and void when drafted (see *Foster v. Shipbldg. Co. v. County of L.A.* (1960) 54 Cal.2d 450, 459).

The trial court also found that the circumstances in the present case would make enforcement of a spousal support waiver unjust. The court observed that during the marriage wife did not work or pursue further education, choosing instead to dedicate her efforts to child rearing and maintaining the home. Although she did open an exercise studio in 1991, she had restricted her hours to enable her to care for the children. In addition to her reduced earning capabilities during marriage, after separation from husband she could not replicate her financial status and standard of living.

At the time wife signed the prenuptial agreement, a week before the marriage, she was a teenager with a high school education and had not received any advice from an

attorney, or even from an older family member, before signing the agreement. She did not own any real property and was living with her brother and paying him rent of $100 per month. Wife worked as a bookkeeper for a company that did business with husband's company, which is how she met him. Husband, 12 years older than wife, had his own company and owned a house and several vehicles. The court found that wife was "an unsophisticated and inexperienced teenager when, at the insistence of her thirty-one year old fiancé, she waived all rights to spousal support." The court thus concluded that, in view of all the circumstances, enforcement of the spousal support waiver would be unjust.

However, the trial court upheld the provisions in the prenuptial agreement waiving the parties' respective community property interests in real and personal property, finding they were not unconscionable and unenforceable (see Civ. Code, §1670.5, subd. (a)) at the time they were agreed upon. The court found that wife was aware of her obligations under the agreement and voluntarily agreed to assume them: "Anxious to dispel concerns and rumors that she wanted to marry [husband] only for his money, [wife] knowingly agreed to forgo any future interest that she might have as his wife in his property, his business and the income it generated."

The court also emphasized, "Throughout the marriage, [the parties] conducted their married life in a way entirely consistent with [the community property waiver provisions]. The parties maintained separate banking accounts. [Wife] executed dozens of documents, including quitclaim deeds, during the marriage in which she re-consented to the initial waiver of her interest in her husband's income and property. [Wife] maintained all of the income she earned in her business as her's [*sic*] alone. Neither [party] discussed these [waiver] provisions of the premarital agreement until after separation. These particular provisions, therefore were not so harsh at the time that they were made that they can be found to 'shock the conscience.'"

Several years later, in 2005, the remaining marital dissolution issues were tried before Judge Shaller, who appointed an independent expert (see Evid. Code, § 730) to evaluate issues concerning husband's income and expenses. The trial court filed in April

of 2005 a detailed intended judgment, discussing supporting evidence and legal authority, and then filed in June of 2005 its judgment. Judge Shaller adopted Judge Jones's prior statement of decision, finding that wife validly waived her community property rights, but that her purported waiver of spousal support was void. However, Judge Jones's statement of decision did not address wife's pension plan rights in light of ERISA, and Judge Shaller deemed the property provision of the agreement invalid to the extent it purported to terminate any right wife may have had to husband's pension under federal law. Thus, the judgment reserved jurisdiction over the parties' respective rights to survivor annuity and benefits under husband's pension plan. The specific provisions in the judgment as to spousal and child support and other issues are discussed hereinafter, as relevant to the contentions raised by the parties on appeal.

## DISCUSSION

### *I. The validity of the waiver provisions in the prenuptial agreement as to community property and spousal support rights.*

*The standard of review.*

The existence of any undue influence in the signing of an agreement is a question of fact reviewed under the substantial evidence standard. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 354-355; *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 632.) However, the standard of review in determining whether a prenuptial agreement is unconscionable is de novo, as unconscionability is ultimately a question of law for the court to determine. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851; *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391; see Fam. Code § 1615, subd. (b).)

"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code, § 1670.5, subd. (a).)

*The trial court properly found the waiver of spousal support in the prenuptial agreement was invalid and unenforceable.*

In husband's appeal, he attacks the finding that wife's waiver of spousal support in the 1985 prenuptial agreement was invalid and thus unenforceable. Although husband asserts the trial court erred in finding the waiver of spousal support unconscionable, the court specifically addressed unconscionability only in the context of the waiver of community property interests, and not as to spousal support. Rather, the trial court analyzed the waiver of spousal support in light of *Pendleton, supra,* 24 Cal.4th 39, and found the provision waiving spousal support invalid both because it was illegal and void when drafted (though now permissible), and because the circumstances at the time of the enforcement of the waiver might make enforcement unjust. (*Id.* at p. 53.)

The Supreme Court in *Pendleton, supra,* 24 Cal.4th 39, had before it the issue of whether a 1991 premarital agreement waiving spousal support could be enforced, despite the Legislature's omission of a provision allowing spousal support waivers when it adopted the bulk of the Uniform Premarital Agreement Act (the UPAA), and in light of existing case law that generally prohibited such agreements. (*Id.* at pp. 48-49, 53, 55-57.) *Pendleton* held that "when entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy. Such agreements are, therefore, permitted under [Family Code] section 1612, subdivision (a)(7), which authorizes the parties to contract in a premarital agreement regarding '[a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.'" (*Pendleton,* at p. 53.)

The court in *Pendleton* also discussed prior legislative history and case law, noting that "[a]t the time the California version of the Uniform [Premarital Agreement] Act was adopted [in 1985], this court had held that agreements waiving the right to spousal support were unenforceable as being against public policy if the waiver would promote or encourage dissolution." (*Pendleton,* at p. 46.) *Pendleton* explained prior case law, which is applicable to the 1985 agreement at issue here. Prior case law held as to "both spousal

support and property division, that to be valid, premarital agreements must be made 'in contemplation that the marriage relation will continue until the parties are separated by death. Contracts which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy." (*Ibid.*) Thus, a spousal support waiver in a premarital agreement prior to the UPAA was not unenforceable per se, but was unenforceable only if on its face it promoted dissolution and thus violated the public policy favoring marriage. (*Pendleton*, at p. 51.)

In the present case, the premarital agreement provided that "[s]hould [wife] and [husband] ever dissolve their marriage, neither will have any obligation to pay the other spousal support." The agreement also contained a death benefit, providing that in the event the parties were still married and still living together as husband and wife at the time of husband's death, husband's estate would pay $10,000 to wife.

We find that the spousal support provision in the premarital agreement was not made in contemplation that the marriage relation would continue until the parties were separated by death, and that agreement improperly facilitated divorce by focusing upon a settlement in the event of a divorce. Although the agreement also contained a death benefit giving wife a lump sum from husband's estate in the event of his death while married, the provision was unilateral and entailed a relatively small or token amount of money. Such a provision cannot rescue this agreement made in blatant contemplation that the marriage relationship, in fact, might well end prior to death. Thus, under the law in existence at the time of the agreement and prior to *Pendleton*, we find the agreement improperly facilitated divorce by emphasizing a settlement upon such an event and was therefore void as against public policy.

Moreover, even applying *Pendleton* retroactively to the present case, the outcome would be the same. The court in *Pendleton* noted that circumstances existing "at the time of the enforcement" of a spousal support waiver "might make enforcement unjust." (*Pendleton, supra,* 24 Cal.4th at p. 53.) Unlike the petitioner in *Pendleton,* wife here was "not a 'well-educated person, self-sufficient in property and earning capacity,' at the time that she entered [the] agreement." Rather, wife was a high school graduate, living in her

brother's home and paying him $100 per month for the use of a room. She had no property and was not self-sufficient, as that term was used to describe the petitioner in *Pendleton.* As the trial court aptly found, wife was "an unsophisticated and inexperienced teenager when, at the insistence of her thirty-one year old fiancé, she waived all future rights to spousal support. . . . [Wife] did not seek, nor did she receive, any counsel or advice from an attorney or even an older family member with regard to her marital rights and obligations before executing the waiver."

Furthermore, the marriage in the present case lasted 13 years, during which wife did not pursue her education or work for several years. Instead, she devoted her efforts to child rearing and maintaining the home. Although she opened an exercise studio in 1991, she had restricted her hours of work to enable her to care for the children, thus substantially reducing her earning capacity. After separation from husband, wife was living modestly and generally unable to replicate the marital standard of living she had previously.

Accordingly, in view of all the circumstances at the time of enforcement of the spousal support waiver, the trial court properly deemed it "unjust" and thus invalid and unenforceable under *Pendleton, supra,* 24 Cal.4th 39, 53.

*The trial court properly found wife's waiver of her community property interest in the prenuptial agreement valid and not unconscionable.*

Regarding the division of property, the prenuptial agreement specified that both husband and wife would treat all real and personal property belonging to each party "at the time of marriage or acquired during the marriage" as each party's separate property subject to that party's disposition. This provision effectively constituted a waiver of community property rights.

Wife contends in her cross-appeal that because the trial court found factors such as the disparity in age, education and financial strength, as well as wife's lack of legal representation or family advice, combined to render the waiver of the spousal support unconscionable, by parity of reasoning the waiver of community property interests should also be deemed unconscionable. However, as previously noted, the unenforceability of

the spousal support waiver was not premised on an analysis of unconscionability, but rather on the general notion of unjustness as discussed in *Pendleton, supra,* 24 Cal.4th 39, 53.

Nor, analyzing the matter independently now, is there any merit to wife's contention that her waiver of her community property interests was unconscionable, or that the entire agreement was unconscionable. (See Civ. Code, § 1670.5, subd. (a).) A claim that an agreement is unconscionable entails both procedural and substantive elements. "Substantive unconscionability focuses on the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties." (*American Software, Inc. v. Ali, supra,* 46 Cal.App.4th at p. 1390.)

The indicia of procedural inequality include "'oppression, arising from inequality of bargaining power and the absence of real negotiation or a meaningful choice' and 'surprise, resulting from hiding the disputed term in a prolix document.'" (*American Software, Inc. v. Ali, supra,* 46 Cal.App.4th at p. 1391.) The substantive element focuses on whether the allocation of risks or costs are so overly harsh or one-sided and not justified by the circumstances in which the contract was made, with the result that it "'*shock[s] the conscience*.'" (*Ibid.*, original italics.) Unconscionability is determined at the time the agreement is entered into, not in light of subsequent events (Civ. Code, § 1670.5), and is ultimately a question of law for the court. (*American Software, Inc. v. Ali, supra,* 46 Cal.App.4th at p. 1391.)

As noted by the trial court, even though the parties differed in their recall of the circumstances surrounding the creation of the agreement, there was no basis to believe that wife was surprised by anything contained in the succinct and clearly stated provisions of the agreement. Wife read the agreement before signing it, never communicated to anyone any lack of understanding about its terms, was not surprised or under duress, and voluntarily agreed to the terms in the agreement without any fraud or deceit by husband. In fact, because she was anxious to dispel concerns and rumors that she wanted to marry husband only for his money, wife knowingly agreed to forgo any

future interest she might have in his property, his business, and the income his business generated. Accordingly, in view of all the relevant circumstances, there is no merit to wife's claim of unconscionability of the separate property provisions or of the document as a whole.

Equally unavailing is the related contention that wife's signature was purportedly procured by undue influence. There is no evidence, for example, that husband misrepresented the agreement to wife when she signed it, or that they thereafter conducted their affairs as if the agreement did not exist. (Compare *Estate of Nelson* (1964) 224 Cal.App.2d 138, 142.) In fact, husband and wife--who did not discuss the provisions in the prenuptial agreement until after they separated--conducted their married life in a manner entirely consistent with their agreement as to separate property. They maintained separate bank accounts, and wife executed dozens of documents, including quitclaim deeds, during the marriage, whereby she essentially re-consented to the initial waiver of her interest in her husband's income and property. And, wife kept all of the income she earned from her business as her separate property.

Thus, with no misrepresentations or duress at the time the agreement was signed and no confusion as to separate property demonstrated during the marriage, there is scant support for the notion of undue influence upon wife at the time she signed the agreement.

***II. Husband's various challenges to retroactive spousal support, attorney fees, child support and visitation, and other issues.***

*Retroactive spousal support.*

Husband contends that the trial court in 2005 acted in excess of its jurisdiction by changing a 1998 order that did not provide for any spousal support, and that retroactive spousal support cannot be ordered when there is no motion pending for spousal support. However, the trial court has the statutory authority to award retroactive spousal support: "An order for spousal support in a proceeding for dissolution of marriage or for legal separation of the parties may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date." (Fam. Code, § 4333.) Moreover, although the April 1998 stipulated order did not provide for spousal support, the issue of

whether wife was entitled to any spousal support was bifurcated and not decided until ruled upon by Judge Jones in 2002. Thus, spousal support could not even have been ordered until 2002, and the 2005 order was not in excess of the court's jurisdiction.

*Amount of spousal support and attorney fees award.*

The court ordered, in pertinent part, that husband pay as follows: (1) spousal support of $500 per month from April 1, 1998, until August 1, 2001 (with arrears calculated for that time period to be $19,500); (2) spousal support of $325 per month from August 1, 2001, until April 1, 2005 (with arrears calculated for that time period to be $15,600); (3) spousal support of $250 per month from May 1, 2005, until May 1, 2008, "at which time the support will reduce to [j]urisdictional" until May 1, 2012; and (4) spousal support arrearages to be paid monthly in the amount of $975 from May 15, 2005, until the full amount of arrears is paid.

Husband complains both that the trial court wrongly attributed certain income to him that he did not have, and that it did not consider certain factors relevant to wife's true income. However, as discussed below, the spousal support ordered was well within the court's discretion and based on consideration of testimony from the parties and documentary evidence.

As indicated in the trial court's statement of intended decision, husband had a positive cash flow of approximately $1,122 per month from renting to his company (AAC) a building he owned, received $456 per month in interest on a stockholder loan he made to AAC, received discretionary income of $1,225 per month from AAC (through the use of company credit cards to pay personal expenses and company reimbursement for expenses related to an airplane and a company car), received $2,208 per month in salary from ACC, and should be assessed an additional $160 per month in imputed income based on the rental value of certain real property he had.

Husband's income, based on the above figures, totaled approximately $5,200 per month, and is supported by ample evidence in the record. Moreover, the trial court rejected wife's claim that it should have imputed a higher interest rate, payable to husband, on the stockholder loan to ACC, and accepted husband's argument for a lower

interest rate so as not to unduly handicap the corporation. Thus, contrary to husband's assertion, the trial court demonstrated fairness in its assessment of his income.

Regarding wife's income, determined to be approximately $2,500 per month, husband argues that the trial court failed to take into account all the statutory factors (Fam. Code, § 4320) it was required to consider in ordering support. Husband asserts, for example, as follows: that the court arbitrarily "failed to consider" his financial contribution to wife by a "loan" to her to start her Jazzercise business and to enhance her skill and training as a personal trainer; that the court did not properly consider wife's cohabitation, which created a rebuttable presumption of decreased need for spousal support (Fam. Code, § 4323); that the court improperly concluded that husband's loans from his corporation allowed him to fund the litigation without affecting his lifestyle while wife was forced to pay from needed funds for her support; and that the court did not exercise independent judgment because it largely accepted the figures used by wife.

However, the record establishes that the trial court was well aware of and considered a myriad of factors brought to its attention by husband. Just because the court did not accept husband's arguments about such issues does not mean the court failed to "consider" the matter. Assessing a factor urged by husband and rejecting it is not an abuse of discretion where husband fails to establish that any determination by the court was capricious, whimsical, or beyond the bounds of reason. (See *Estate of Gilkison* (1998) 65 Cal.App.4th, 1443, 1448-1449.)

For example, as to wife's cohabitation with a boyfriend, the trial court refused to conclude that wife received $600 per month income in the form of rent from her boyfriend, and found that she was merely being reimbursed by her boyfriend for half the rent, which was a cost-sharing arrangement, and that the boyfriend later paid his half of the rent directly to the landlord. Similarly, the trial court reviewed relevant financial information as to wife's Jazzercise business, which it found was more of a hobby and actually operated at a net loss, and evaluated the economic value and financial details of wife's several bookkeeping positions. On appellate review of abuse of discretion claims,

we are "'neither authorized nor warranted in substituting [our] judgment for the judgment of the trial judge.'" (*Id.* at p. 1449)

Husband's challenge to the attorney fees awarded merely asserts that because it was based on purportedly erroneous findings as to spousal support and there was no evidence husband could pay the attorney fees, the award should be reversed. Apart from the fact that such a thread-bare general assertion is unsupported by specific argument (see *People v. Stanley* (1995) 10 Cal.4th 764, 793), it is without merit. Wife's counsel submitted a detailed declaration specifying the fees incurred and reflecting an unpaid balance of approximately $46,400, and the trial court specifically indicated in its written judgment that it had considered the various statutory factors (Fam. Code, §§ 4320, 2032) in ordering that husband pay to wife attorney fees and costs in amount of $17,500. We find no abuse of the trial court's broad discretion in its award of attorney fees.

*Reimbursement of wife's medical expenses.*

Husband contends that the trial court wrongly required him to reimburse wife for medical expenses incurred after she was injured in an automobile accident. Wife argued before the trial court that husband had been required to maintain her health insurance but had failed to do so, and that she was therefore without insurance when the accident occurred.

The trial court ordered husband to reimburse wife for the amount of medical bills paid by her from her personal injury settlement, less 20 percent of the total bills incurred, for a net payment of $16,849.04. The court also required husband to repay wife 80 percent of the medical bill from Foothill Presbyterian, amounting to $2,160. The court found the medical expenses were incurred as a direct result of husband's failure to maintain medical insurance for wife, though he was required to do so pursuant to prior court orders. The court noted there was no evidence that any of the medical bills were inappropriate to the injury received or that the charges incurred were anything other than appropriate, and that husband offered no evidence of the degree to which the medical bills would have been covered if the insurance had been in effect at the time of the accident.

Husband urges that wife admitted in her deposition that she knew before the accident in 2001 that she was without medical insurance coverage, and that at trial she acknowledged realizing in 1999 that she had been taken off the insurance policy because she had a surgical procedure then that was not covered by insurance. Husband also testified that he estimated wife had been taken off his medical insurance policy about the time she was sent a "COBRA letter" by the insurer in June of 1999.

However, the basis for the trial court's ruling on this issue was the simple fact--ignored by husband in his opening brief--that husband had been ordered in April of 1998 to maintain and not permit to lapse the health insurance covering his wife. Husband presented no evidence justifying his disobedience of the trial court's order. The court thus did not abuse its discretion in ordering husband to reimburse wife for her medical expenses which were a direct result of his failure to maintain medical insurance for wife as required by prior court order.

*Husband's pension plan.*

Husband contends that Judge Shaller was bound by the earlier ruling of Judge Jones that wife's waiver of community property interests in the prenuptial agreement operated to deny her any rights in his pension plan. However, as Judge Shaller pointed out in the intended statement of decision, the prior decision of Judge Jones was a "tentative decision" (former Cal. Rules of Court, rule 232(a)), was never rendered part of a judgment, and thus was not binding on other judges who might later become involved in the litigation. Also, Judge Jones did not specifically address wife's pension plan rights in light of ERISA.

Judge Shaller further found that husband had a substantial pension plan through his company (ACC), and that the plan was governed by ERISA. The court then found that under existing case law although wife could waive her rights to husband's pension, it would be valid only if the waiver was sufficiently clear and specific.

Here, the terms of the prenuptial agreement provided that wife agreed that all property "including any interest in a pension plan arising from work" belonging to husband "shall be his separate property and shall be subject to his disposition as his

separate property." Judge Shaller's intended statement of decision found that the terms of the agreement did not limit the waiver of pension benefits to the event of dissolution or except wife's right to death benefits. The agreement was a "blanket waiver of all pension rights including periods during marriage and after death" of husband. Also, the court found that the blanket waiver in a prenuptial agreement of this federally protected property right was not only violative of ERISA requirements, but an unconscionable waiver. The court thus viewed the prenuptial agreement as "unenforceable to the extent that it purports to terminate any rights that [wife] has under Federal law to survivor annuity and/or survivor benefits."

However, Judge Shaller's judgment--which is ultimately what we review on appeal, and not the intended statement of decision discussed above--did not take the next step and adjudicate the actual value of the pension and the monetary interest wife may have in it. Indeed, the judgment did not go as far as the intended statement of decision, and it merely held as follows on the pension issue: "As the prior statement of decision [by Judge Jones] does not address the pension plan rights of [wife] in light of ERISA, the Court *reserves jurisdiction over the parties*[*'*] *respective rights to survivor annuity and benefits under [husband's] pension plan*." (Italics added.) Any resolution of this issue in the present appeal is thus premature, as there has not yet been any determination that wife has any interest of any particular value in the pension plan. We thus deny husband's request to confirm his pension as his separate property.

*Reimbursement of community expenses.*

Judge Shaller's judgment provided as follows: "The net total community assets and debts awarded to [husband] is $2,575. [Husband] is ordered to pay [wife] the sum of $1287.50." Husband contends that the equalization payments the trial court ordered with respect to community property, which resulted in a net payment of $1,287.50 from husband to wife, was unfair. However, we find no abuse of discretion in the trial court's allocation of property and its assessment of value, half of which was properly awarded to wife.

*The 1997 tax refund.*

Judge Shaller's intended statement of decision explained as follows: "The 1997 joint tax refund [to] the parties in the amount of $1,700 . . . is awarded to [husband] subject to equalization payment. [Husband] failed to prove his contention that the refund was solely due to over-withholding from his separate property paycheck just as [wife] has failed to prove that this refund was due to her from taxes paid on any of her income."

It is undisputed that the tax refund was based on a joint tax return and was payable to both husband and wife. To be entitled to the refund, husband would have to establish that he paid all the taxes with his separate funds and that wife's activities did not contribute to the tax refund. Since husband cites no evidence to establish these factors, we find the trial court was correct in dividing the refund equally between husband and wife.

*Calculation of income used to determine child support payments.*

Husband contends that Judge Shaller's findings in his intended statement of decision as to the parties' incomes are not supported by substantial evidence. Husband complains that it was an abuse of discretion to impute certain items as income, that several of the court's calculations were in error, and that the court should not have limited the production of certain documents.

However, husband essentially seeks to revisit issues largely determined in our prior unpublished opinion in 2005, in which he unsuccessfully appealed the trial court's earlier determination of imputed income used to calculate child support. Although the prior decision addressed husband's sources of income when the court established interim child support levels in 2003 and husband now challenges the permanent child support levels set in 2005, the court basically considered the same items of income in 2005 as it did in 2003 (updated by records from 2004 and early 2005). As previously noted herein in discussing the amount of spousal support awarded, the trial court extensively reviewed the evidence regarding the income of both husband and wife. Once the court determined the income of the parties, the calculation of the levels of child support was relatively straightforward.

We find no abuse of the trial court's broad discretion or any error warranting reversal of the judgment as to child support.

*Custody and visitation.*

There is no support for husband's notion that the court's judgment was inadequate as to custody and visitation issues. Those issues were being worked out by the parties and were intended to be resolved by agreement. The trial court aptly concluded that, "Should the matter of the settlement fall apart, then we'll have to have a second bifurcated trial on that issue, but I don't want to have delay and further consumption of time on issues that I don't believe are really at issue in this case."

*Claimed denial of due process and a fair hearing.*

Finally, there is no merit to husband's contention that Judge Shaller's various rulings denied him due process or fair hearing. Husband complains, for example, about the court's denial of a motion to strike, its denial of a second request for a continuance, adverse rulings on several evidentiary matters, the alleged disparity in the amount of time each party had to present its case, and the apparent failure to rule on the admissibility of husband's exhibits after taking the matter under submission.

However, adverse rulings do not necessarily establish a denial of due process, and the court has a duty to control the proceedings during trial and may limit introduction of evidence and argument of counsel. (See *People v. Blackburn* (1982) 139 Cal.App.3d 761, 764; *Mowrer v. Superior Court* (1969) 3 Cal.App.3d 223, 230.) To the extent the court failed to rule on a matter before it, the general rule is that if the litigant has not further pursued the matter with the trial court, it may be deemed waived or abandoned. (See *Campbell v. Genshlea* (1919) 180 Cal. 213, 220; *People v. Obie* (1974) 41 Cal.App.3d 744, 750.)

## DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.